BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LOIS J. BRYANT	)	
Claimant	)	
	)	
VS.	)	
	)	
ADVANTAGED HOME CARE, INC.	)	
Respondent	)	Docket Nos. 1,030,116,
	)	1,034,009 & 1,040,451
AND	)	
	)	
TRAVELERS INSURANCE COMPANY[1]	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 19, 2009, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on January 13, 2010. John J. Bryan, of Topeka, Kansas, appeared for claimant. Ronald A. Pritchard, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

In Docket No. 1,030,116, the Administrative Law Judge (ALJ) found that claimant suffered injury to her right knee but did not prove that she injured her back as a result of her accident at work on April 25, 2006. The ALJ found that claimant had a 37 percent permanent partial impairment to her right lower extremity based on the rating opinion of Dr. Edward Prostic. The ALJ found Dr. John Gilbert's testimony that 28 percent of claimant's functional impairment was preexisting was not persuasive. Further, the ALJ found that there was no evidence that claimant was being prescribed Coumadin for the long term and, therefore, did not find an additional impairment rating for claimant's use of Coumadin after her right knee surgery.

[1] Liberty Mutual Insurance Co. carried workers compensation insurance coverage on respondent from January 20, 2003, to January 20, 2005. It was stipulated by the parties that claimant had no claim of injury during that period, and Liberty Mutual Insurance Co., which had been represented by James Blickhan, was dismissed from the cases at the Regular Hearing. See R.H. Trans. at 12-16.

In Docket No. 1,034,009, the ALJ found that claimant suffered an exacerbation of her preexisting back condition as a result of her job duties at respondent and was entitled to a work disability. The ALJ found that claimant's average weekly wage (AWW) at the time of her accident was $376.02 but thereafter was $90.81. Therefore, she found claimant had a wage loss of 76 percent. She also found that claimant had a 50 percent task loss, and was, therefore, entitled to a work disability of 63 percent until her last day worked on May 19, 2008. After that date, claimant suffered a 100 percent wage loss which, averaged with her 50 percent task loss, computes to a 75 percent work disability.

In Docket No. 1,040,451, the ALJ found that claimant's injury was a natural and probable consequence of her back injury suffered through April 2, 2007, which is the subject of Docket No. 1,034,009, rather than a new and distinct injury. The ALJ found that claimant's AWW as of May 19, 2008, was $109.58.

Last, the ALJ found that genuine disputed issues existed in all three claims and denied claimant's request for an assessment of interest under the provisions of K.S.A. 44-512b.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues that she was a full time temporary employee and her wage should be treated for each of her accidents as the amount of her wage, $9.25 per hour, times 40 hours or $370 per week. Claimant also argues that she is permanently totally disabled. Claimant further contends that she suffered a blood clot after surgery on her right knee, which resulted in her being prescribed Coumadin. Therefore, she argues she is entitled to a permanent functional impairment in the amount of 2 to 3 percent to the body as a whole for her chronic use of Coumadin. In the event the Board does not find that claimant is permanently totally disabled, claimant requests that the Board affirm the ALJ's finding that she is entitled to a work disability. Claimant also asks that the Board affirm the ALJ's finding that her May 19, 2008, injury was a direct and natural consequence of her series of back injuries ending April 2, 2007. During oral argument before the Board, claimant withdrew her argument that there was not just cause or excuse for respondent's failure to pay compensation to claimant prior to the award in Docket No. 1,030,116 and, therefore, there is no claim that interest should be awarded to claimant.

Respondent asks that the Board affirm the ALJ's Award. Respondent contends that claimant is not a full-time employee, is not entitled to an additional functional impairment for chronic use of Coumadin, and is not permanently, totally disabled. Respondent agrees with the ALJ that claimant is entitled to a work disability and agrees with the ALJ's calculation of that work disability.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability for each accident?

(2) Did claimant sustain a new, separate and distinct accident and injury on May 19, 2008, or is all of her disability a natural consequence of her previous condition?

(3) What is claimant's AWW in Docket No. 1,034,009 and Docket No. 1,040,451?

FINDINGS OF FACT

Claimant has filed three workers compensation claims against respondent. Her first claimed accident occurred on April 25, 2006, when she claims she injured her right knee and associated body parts. This claim was assigned docket number 1,030,116.[2] On April 5, 2007, claimant filed a second Application for Hearing, claiming she suffered injuries to her upper and lower back, both legs, right foot and any other affected body part due to repetitive work activities and an altered gait due to her knee injury. The Application for Hearing sets out a date of accident of December 2003 through April 2, 2007. However, at the regular hearing, claimant's attorney orally amended the date of accident to a series from April 25, 2006, through April 2, 2007. This claim was assigned docket number 1,034,009. The third Application for Hearing was filed June 3, 2008, and claimed injuries to her lower and upper back and right leg. The date of injury claimed was May 19, 2008. This third claim was assigned docket number 1,040,451.

Claimant began working for claimant on December 16, 2002, as a home health aide. Her job entailed going into client's houses and cleaning, doing dishes, changing and making beds, and doing laundry. She also would take personal care of the clients, including giving them baths and showers, washing their hair, brushing their teeth, and helping them on and off the commode and in and out of wheelchairs. She would also do their shopping and accompany them shopping.

On April 25, 2006, claimant twisted her right knee as she was lifting a wheelchair out of the trunk of a car. The next morning, her knee was swollen, and she went to the emergency room, where x-rays were taken. She was given a brace and some pain pills. She was eventually seen by Dr. Vincent Key, an orthopedic surgeon. Dr. Key performed arthroscopic surgery on claimant's right knee on July 6, 2006. Claimant also claimed injuries to her back resulting from her injury of April 2006. In a preliminary hearing held March 7, 2007, claimant requested further treatment for her right knee and treatment for her back symptoms.

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[2] Form K-WC E-1, Application for Hearing, filed July 27, 2006.

Claimant testified that after her right knee surgery in July 2006, her knee continued to hurt. She said that Dr. Key had talked to her about a total knee replacement. Claimant further testified that she had pain from her back down her right leg to the top of her foot. She had been seen by her family doctor, who sent her to Dr. Kenneth Gimple. Dr. Gimple ordered an MRI, which was performed on January 9, 2007. The MRI showed that claimant had anterolisthesis of L4-5 with a disc bulge and facet degenerative change due to mild spinal canal stenosis. She had a lesser disc bulge at L5-S1 and a greater circumferential disc bulge at T12-L1 but without stenosis. Dr. Gimple referred her to Dr. Florin Nicolae, an anesthesiologist, who gave her an epidural steroid injection on January 17, 2007. Claimant testified that the injection helped for a couple weeks but then wore off.

Claimant testified at the March 7, 2007, preliminary hearing that she had been seeing Dr. John Martinez for eight or nine years and was diagnosed with rheumatoid arthritis. She said the rheumatoid arthritis affects her hands and shoulders, but has not spread to her back or other parts of her body. Claimant also admitted that she had been seeing a chiropractor for her back for two or three years before her injury of April 2006.

In an Order of March 8, 2007, the ALJ ordered medical treatment to be paid by respondent for claimant's right knee condition, and on July 9, 2007, claimant had total right knee replacement surgery performed by Dr. Joseph Mumford. However, the ALJ denied claimant's request for medical treatment for her back.

On April 5, 2007, claimant filed an Application for Hearing claiming a series of accidents that resulted in injury to her back, both legs and her right foot. At a preliminary hearing held May 23, 2007, claimant testified that since her April 2006 injury, she had been on light duty, and her hours were cut to 10 hours per week. She said she had only one client. The client was in a wheelchair, but she did not have to lift her. She described her job duties as mopping, vacuuming, sweeping, laundry, and grocery shopping. Claimant testified that her back condition had worsened since April 2006 and she has constant pain in her neck and down her back to her right hip and leg to the top of her foot. She said she could only walk 10 to 20 feet without her back starting to hurt. She denied having a limp. She testified that the epidural injections she received in January 2007 helped only about a week.

Claimant testified again about her rheumatoid arthritis. Claimant said her rheumatoid arthritis started in her hands and has moved into her elbows and shoulders. It is also present in her knees. She denied that her rheumatoid arthritis condition has affected her back. Claimant again testified that she had seen a chiropractor for a period of two to four years for back pain. She said she was told by the chiropractor that she had a pinched nerve in her back. She testified that the chiropractic treatments gave her short-term relief, but she had not seen a chiropractor since her accident of April 2006. In an Order dated May 29, 2007, the ALJ again denied claimant's request for medical treatment for her back condition.

At a preliminary hearing held August 13, 2008, claimant testified that on May 19, 2008, she was bent over while cleaning a client's bathroom when she felt a pop in her back. She felt pain in her back that subsequently went down her leg from her hip to her ankle. She reported the accident to respondent and was sent to the emergency room, where she was seen by Dr. Mead. Dr. Mead prescribed physical therapy, but that treatment was denied by respondent. He also gave her a lifting limit of 15 pounds.

Claimant testified she had previously undergone epidural injections with Dr. Nicolae, and they helped. She said she went several months without any significant problems with her back after those injections.[3] At the time of the August 13, 2008, preliminary hearing, she testified she had constant pain in her back and that she could not sit, stand or walk for long periods of time. In a Nunc Pro Tunc Order of September 3, 2008, the ALJ found that claimant was entitled to medical care and designated Dr. Glenn Amundson to be her authorized treating physician for her back condition.

Dr. John Gilbert, a board certified orthopedist and independent medical examiner, examined claimant regarding her right knee condition on March 19, 2008, at the request of respondent. Claimant had previously been seen by Dr. Joseph Mumford, another physician in Dr. Gilbert's office. Dr. Mumford performed a right total knee arthroplasty on claimant. The procedure was performed on July 9, 2007, and claimant was released to sedentary activities as of August 8 and to full duty without restrictions as of October 3, 2007.

After meeting with claimant, performing a physical examination, and reviewing her x-rays and medical records, Dr. Gilbert diagnosed her with rheumatoid arthritis involving the right knee with degenerative joint disease. He said she had an acute knee strain status post arthroscopy with debridement and right knee replacement arthroplasty. He said claimant currently has advanced degenerative disease in her knee. Dr. Gilbert stated it was probable that on April 25, 2006, claimant exacerbated symptoms of her arthritis. Dr. Gilbert recommended she limit standing and walking to 2 to 4 hours a day, lift no more than 25 pounds, and do no stooping or crawling.

Using the AMA *Guides*,[4] Dr. Gilbert rated claimant as having a permanent partial impairment of the right lower extremity of 37 percent because she had a right knee replacement arthroplasty with a good result. He believed that 75 percent of her impairment was a result of preexisting disease, and 25 percent of her impairment was a result of the April 25, 2006, injury. In coming to this opinion, he reviewed claimant's x-rays taken about

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[3] This is contrary to her testimony in the preliminary hearings held March 7, 2007, and May 23, 2007.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

six weeks after her initial injury and noted she had moderate to advanced diffuse degenerative disease with osteophyte formation and marked narrowing of the patellofemoral joint. He said those were long standing and advanced changes. Further, Dr. Gilbert said that Dr. Mumford had previously evaluated claimant's right knee in 2000. At that time, she was noted to have mild degenerative changes with peaking of tibial spine, small marginal osteophytes, but the joint spaces were well preserved. Dr. Gilbert agreed that the AMA *Guides* require certain criteria to make a definitive rating evaluation, and the information required for him to rate claimant's preexisting impairment had not been provided to him.

Claimant was seen by Dr. Glenn Amundson on July 11, 2008, at the request of her attorney. He did not examine her right knee but saw her only concerning her back complaints. Claimant described her accident of May 19, 2008. She told Dr. Amundson that she had a series of epidural steroid injections a year earlier and had complete resolution of symptoms until her May 19, 2008, injury.[5] She told Dr. Amundson that her pain was mostly centered in her low back in the morning hours and in her legs throughout the day. After examining claimant, Dr. Amundson diagnosed her with mobile spondylolisthesis or anterolisthesis, grade 1, at L4 and L5; degenerative disk disease at L4-5 and L5-S1; facet arthrosis of L4-L5; lateral recess spinal stenosis, greater on the left, at L4-L5, and low back pain and radiculopathy. Dr. Amundson believed that claimant's injury of May 19, 2008, was an aggravation of a preexisting condition. He recommended epidural steroids, activity restrictions, and a mild analgesic for pain control.

After this initial visit, Dr. Amundson saw claimant for treatment and follow up. While under his care, claimant had one or two epidural steroid injections, which he said "worked to put things down."[6] He said her nerve root injury had resolved. On January 21, 2009, he found her to be at maximum medical improvement. He believed that she was capable of returning to work, with some permanent restrictions. He thought claimant fell into a light/medium physical demand level, which meant occasional lifting to no more than 35 pounds. Because she specifically related she had a problem with sitting for long periods of time, he felt she should be allowed the opportunity to change positions from sitting to standing or sitting to walking on an occasional basis during the day.

Using the AMA *Guides*,[7] Dr. Amundson rated claimant as being in DRE II, for a 5 percent whole person impairment. Because of her preexisting spondylolisthesis and

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[5] Again, this is contrary to her testimony at the preliminary hearings held March 7, 2007, and May 23, 2007.

[6] Amundson Depo. at 20.

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

stenosis, for which she had previously received epidural steroids, he opined that half of her 5 percent rating was preexisting, leaving a 2.5 percent permanent partial impairment that was the result of her work-related accident of May 19, 2008.

Claimant was examined by Dr. Peter Bieri on August 4, 2008, at the request of respondent.[8] Claimant gave him a history of her two accidents of April 25, 2006, and May 19, 2008, as well as her claim of a series of accidents after the April 2006 accident. Dr. Bieri opined that claimant's current back complaints appeared to be a temporary exacerbation of her preexisting lumbar spine disease. He said that conservative treatment was appropriate. He indicated that it was doubtful that any permanent impairment could be attributed to her most recent exacerbation of May 19, 2008. He further stated that based on his review of claimant's medical documentation, her preexisting lumbar spine condition was not work related.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant twice, both times at the request of claimant's attorney. At his first examination on February 28, 2007, he noted that claimant had an accident on April 25, 2006, at which time she injured the joint surface of her right knee and debridement had to be done to the articular cartilage of the medial femoral condyle. He noted claimant had grade III chondromalacia and believed the twisting movement with the weight of the wheelchair in her hands further damaged the weakened surface. Dr. Prostic also noted claimant had degenerative spondylolisthesis, for which she had been given epidural steroid injections. X-rays showed claimant had spondylolisthesis and disk space narrowing at L5-S1. Both those conditions would contribute to a stiff and painful low back. He said degenerative disk disease is consistent with pain down the leg.

Claimant complained to Dr. Prostic of pain in the middle of her back and down her right leg to the top of the foot. She said the back and leg pain woke her up at night. She also complained that her knee would click and pop and that she had weakness of the knee. Those symptoms would be consistent with the description of her injury.

In February 2007, Dr. Prostic concluded that claimant had sustained injury to her right knee when she aggravated her preexisting degenerative joint disease. He predicted she would need a total knee replacement. Further, he found claimant had aggravated her degenerative disk disease and had central spinal stenosis at L4-L5. He believed the mechanism for her back injury was her repetitious activities at work, especially vacuuming.

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[8] Although Dr. Bieri's deposition was not taken, it was agreed by the parties at the Regular Hearing that the exhibits to the preliminary hearings were to be made a part of the record in these cases. See. R.H. Trans. at 23. Dr. Bieri's report of August 4, 2008, can be found as Resp. Ex. 2 to the August 13, 2008, preliminary hearing.

Dr. Prostic saw claimant again on February 20, 2009. At that point, she had undergone a total knee replacement on July 9, 2007, and reported a new injury on May 19, 2008. She continued to have significant soreness of her right knee. She also had tenderness in the lumbar area and in the left lower paraspinous muscles. Dr. Prostic took stress x-rays that showed claimant had grade I/II spondylolisthesis at L4-L5 with vacuum disc phenomenon at L5-S1. He opined that claimant had symptoms suggestive of an L4 radiculopathy. He predicted that if her radicular symptoms worsened, she would need surgery.

Dr. Prostic testified that there is a connection between claimant's knee injury of April 25, 2006, and her accident of May 19, 2008. After he examined claimant in February 2009, he noted that claimant squatted only to 1/3 of normal excursion. When Dr. Prostic saw claimant in February 2007, after her knee injury but before her knee replacement, claimant was capable of a full squat. Dr. Prostic said that because claimant could not squat, she would have had to bend at the waist to lift something from the floor or from a low height, which would have increased the likelihood of her further injuring her low back. He believes that is what happened in May 2008 when she bent over and felt a pop in her back.

Claimant told Dr. Prostic she developed blood clots after her knee replacement surgery and was taking Coumadin. Dr. Prostic said claimant would likely have to take the Coumadin long term.

Dr. Prostic opined that claimant should continue under the restrictions imposed by Drs. Gilbert and Amundson.

Using the AMA *Guides*, Dr. Prostic rated claimant as having a 15 percent permanent partial impairment based on the range of motion model. He said the impairment was for degenerative disk disease with loss of motion and some radicular symptoms. He also found that claimant had a 37 percent permanent partial impairment to her right lower extremity because of the total knee replacement. This converts to 15 percent to the body as a whole. Using the Combined Values Chart, claimant's impairments would calculate to a 28 percent permanent partial impairment to her whole body. Claimant would also be entitled to an impairment rating for her chronic use of Coumadin. He opined that claimant would have a 2 to 3 percent permanent partial impairment for that. This would add one or two percent to claimant's whole body impairment and would raise it to 29 or 30 percent. Dr. Prostic opined that claimant's chronic use of Coumadin is a natural and probable consequence of her knee surgery causing the blood clotting.[9]

[9] Respondent's attorney objected to this testimony because it was not included in Dr. Prostic's report.

Bud Langston, a vocational rehabilitation consultant, met with claimant on February 18, 2009, for the purposes of determining her prior job tasks and her ability to obtain and retain employment in the open labor market. They prepared a task list of 8 tasks that claimant performed in the 15-year period before her injury of April 25, 2006. Claimant had essentially the same job tasks during all of her employment since 1988. Both Dr. Amundson and Dr. Prostic reviewed the task list prepared by Bud Langston. Of the 8 tasks on the list, both opined that claimant is unable to perform 4, for a 50 percent task loss.

Mr. Langston said that claimant has no transferable job skills. She has an associates of arts degree in child care and psychology of child care, but he said that degree would not be beneficial to her in obtaining employment. She also is certified as a nursing aide (CNA) and home health aide (HHA). Mr. Langston did not believe her CNA or HHA licenses would be beneficial to her in obtaining employment because she cannot perform the requirements of either job.

Mr. Langston said that claimant's age would affect her employability. He said it would not be reasonable to try to modify her work station to accommodate her restrictions because she goes into homes. He said she would be able to sit and be a companion to someone, get them some water or fix them a sandwich. However, he said that type of job no longer exists in this society. He does not believe he would be able to place claimant in a job. With her restrictions and work history, he thinks she is not realistically employable in the open labor market, and it would not be realistic to retrain her to do something else because of her age.[10]

At the regular hearing, the parties stipulated to an AWW of $376.02 in Docket No. 1,030,116. Claimant is arguing that the ALJ improperly calculated her AWW for the other two docketed claims. Claimant testified that she was hired as a full-time employee and was earning $9.25 per hour at all times involved in these cases. She had no fringe benefits. She said that until her accident of April 25, 2006, she worked 40 or more hours per week. She was paid time and a half for any time over 40 hours and was paid double time for holidays. During the 26 week period before April 2, 2007, she earned $2,361.10, which averages $90.81 per week. For the 26 weeks before May 19, 2008, she earned $2,849.02 for an average of $109.58 per week.[11]

In the 26 weeks before her April 25, 2006, accident, claimant worked from 21 to 44.25 hours per week for an average of 34.5 hours. In the 26 weeks before her alleged

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[10] Claimant was 66 years old at the time of the regular hearing. She had been receiving Social Security retirement benefits since before her injury of April 25, 2006.

[11] R.H. Trans., Cl. Ex. 1

series of accidents ending April 2, 2007, claimant worked from 8 to 13.5 hours per week for an average of 9.8 hours per week. For the 26-week period before May 19, 2008, claimant worked from 4 hours to 19 hours per week for an average of 11.8 hours.[12]

After claimant was released to return to work after her April 2006 injury, she was released to light duty work only and had work restrictions. Respondent provided her with light duty work, but it did not have enough light duty work to allow her to work a full 40 hours, and she was only able to work from 10 to 12 hours per week. She testified that she only had one or two clients. Although she was not able to work a full 40 hours, claimant considered herself to still be a full-time employee, and she was not told differently by anyone at respondent. She testified that if respondent would have provided her with 40 hours of light duty per week, she would have worked the full 40 hours. She said the only thing limiting her from being able to work is her lifting restrictions.

Renea Bulmer is respondent's owner, administrator and records custodian. She testified that respondent is a temporary agency. It offers jobs as it has them, but there is no guarantee of work. If respondent does not have enough clients, employees will not work. The goal, however, is to have enough business to supply its employees with 40 hours of work a week. But she said that "full-time status" is not a term used at respondent. She said that when respondent has work, it gives the work to the employees. Ms. Bulmer said that after claimant returned to work after her April 2006 injury, respondent had light duty work, which it provided to her. She said that claimant worked fewer hours after her injury.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d provides in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided

[12] R.H. Trans., Resp. Ex. A.

in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

. . . .

(18) Amputation or severance below the wrist shall be considered as the loss of a hand. Amputation at the wrist and below the elbow shall be considered as the loss of the forearm. Amputation at or above the elbow shall be considered loss of the arm. Amputation below the ankle shall be considered loss of the foot. Amputation at the ankle and below the knee shall be considered as loss of the lower leg. Amputation at or above the knee shall be considered as loss of the leg.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510e provides in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[13]

[13] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In *Wardlow*[14], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[15] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[16] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[17]

K.S.A. 2008 Supp. 44-511 states in part:

> (a) As used in this section:
> (1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis, at which the service rendered is recompensed in money by the employer, but it shall not include any additional compensation, as defined in this section, any remuneration in any medium other than cash, or any other compensation or benefits received by the employee from the employer or any other source.
> . . . .
> (4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as

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[14] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[15] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[16] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[17] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.
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> (b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
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> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (I) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

ANALYSIS AND CONCLUSION

Claimant suffered a work-related accident and injury to her right knee on April 25, 2006. The parties stipulated to an AWW of $376.02 for this date of accident. As a result of that injury, she has a 37 percent permanent partial impairment of function to her lower extremity at the level of the leg. The Board finds that claimant is not entitled to the additional 2 to 3 percent impairment suggested by Dr. Prostic for her use of Coumadin because claimant failed to prove that her use of Coumadin is ongoing and chronic. The 37 percent impairment to the level of the leg will not be reduced for any preexisting condition because respondent failed to prove that there was a rateable preexisting impairment and what that percentage of impairment of function would be under the 4th

edition of the AMA *Guides*.[18] It is not sufficient for a physician to opine that a preexisting condition contributed to an injury or disability or even that it contributed to claimant's need for an arthroplasty. K.S.A. 44-510d requires that the loss of a scheduled member be based upon permanent impairment of function using the AMA *Guides*, 4th edition. Accordingly, any preexisting functional impairment should be determined in a like manner. In this case, none of the physicians did so.

Claimant suffered a series of accidents and traumas to her low back each and every working day through May 19, 2008, her last day of work for respondent. On appeal, the parties do not dispute this date of accident finding by the ALJ or the ALJ's conclusion that docket Nos. 1,034,009 and 1,040,451 should be considered as one series of accidents or as a natural consequence. The Board finds claimant suffered a 15 percent permanent impairment of function for her back. The ALJ's findings of a 50 percent task loss and a 100 percent wage loss beginning May 20, 2008, are not in dispute. This results in a 75 percent work disability.

The Board finds claimant is not permanently and totally disabled from substantial and gainful employment. Claimant is capable of working within the restrictions of the physicians. In particular, the restrictions of Drs. Amundson, Prostic and Gilbert that claimant limit standing and walking to two to four hours a day, do no stooping or crawling, and lift no more than 25 pounds[19] do not preclude claimant from working as a home health aide or companion so long as she is not required to assist with ambulation or lifting of patients. Claimant is also capable of performing other sedentary to light medium demand level work of an unskilled nature.

Finally, the Board concludes that claimant was a part time hourly employee. Claimant was not expected to work any certain number of hours per week. She was not considered to be full-time either by the employer or by the customs of her trade. As such, her AWW is computed using the actual hours she worked. Using the 26 weeks next preceding May 19, 2008, her AWW is $109.58.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated October 19, 2009, is affirmed as to Docket No. 1,030,116, but Docket Nos. 1,034,009 and 1,040,451 are modified to find that

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[18] K.S.A. 44-501(c); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Watson v. Spiegel, Inc.*, No. 85,108, unpublished Court of Appeals opinion filed June 1, 2001.

[19] Dr. Amundson restricted her to lifting no more than 35 pounds.

claimant has suffered a 75 percent work disability as of May 20, 2008, and that her compensation rate is $73.06.

DOCKET NO. 1,030,116

Claimant is entitled to 63.84 weeks of temporary total disability compensation at the rate of $250.69 per week in the amount of $16,004.05 followed by 50.38 weeks of permanent partial disability compensation, at the rate of $250.69 per week, in the amount of $12,629.76 for a 37 percent loss of use of the right leg, making a total award of $28,633.81, all of which is past due and ordered paid in one lump sum, less amounts previously paid.

DOCKET NO. 1,034,009

Claimant is entitled to 38 weeks of temporary total disability compensation at the rate of $73.06 per week or $2,776.28 followed by 294 weeks of permanent partial disability compensation at the rate of $73.06 per week or $21,479.64 for a 75 percent work disability, making a total award of $24,255.92.

As of January 28, 2010, there would be due and owing to the claimant 38 weeks of temporary total disability compensation at the rate of $73.06 per week in the sum of $2,776.28 plus 50.43 weeks of permanent partial disability compensation at the rate of $73.06 per week in the sum of $3,684.42 for a total due and owing of $6,460.70, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $17,795.22 shall be paid at the rate of $73.06 per week for 243.57 weeks or until further order of the Director.

DOCKET NO. 1,040,451

Claimant is denied compensation in this case, as the Board finds that claimant's injury of May 19, 2008, was a natural and direct consequence of her series of accidental injuries from April 25, 2006, through her last day worked, May 19, 2008.

IT IS SO ORDERED.

Dated this _____ day of January, 2010.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Ronald J. Pritchard, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge